SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 849

CITY OF MILWAUKEE,

Petitioner,

vs.

CITY OF WEST ALLIS,

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the Wisconsin Supreme Court is reported in 294 *N. W.* 625, decided November 8, 1940. See also record 448 for copy of opinion; and record 461 for order denying motion for rehearing, January 7, 1941.

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 (b), Judicial Code, as amended by the Act of February 13, 1925, and March 8, 1934, 28 U. S. C. A. Sec. 344 (b).

The date of the judgment to be reviewed is November 8, 1940 (R. 448). Petitioner filed a motion for rehearing in the Wisconsin Supreme Court on the 14th day of November, 1940 (R. 460) within thirty days after the date of the decision as required by Rule 37 of the Wisconsin Supreme Court. This motion was denied on January 7, 1941 (R. 461).

The nature of the case and the judgment of the Wisconsin Supreme Court bring the case within the jurisdictional provisions of Section 237 (b), *supra*. The decision of the Wisconsin Supreme Court in reversing the judgment in favor of petitioner herein deprives petitioner of its property and rights without due process of law contrary to the provisions of the 14th Amendment of the Federal Constitution. The petitioner's claims of Federal constitutional right were specifically raised, set up and claimed in its brief upon the appeal at pages 93-101 (R. 478-483), and again in its brief upon its motion for rehearing at pages 51-53 (R. 483-484), and its brief in opposition to respondent's brief in opposition to the motion at pages 8-10 (R. 485-486). The State Supreme Court in its opinion (R. 454) upon the appeal specifically stated that no question of want of due process or other Federal question was involved. The order denying the motion for rehearing was without opinion, the Court stating that it was sufficiently advised of and concerning the motion (R. 461).

Petitioner could not specifically set up or claim the right under the Federal constitution earlier than in its brief upon the appeal, because the issue upon which the State Supreme Court decided the case was not presented in the case until in respondent West Allis' brief upon the appeal at pages 15-24 (R. 472-478). The issue was based upon the claim that because Milwaukee did not file a schedule of rates solely applicable to West Allis for services rendered after January 1,

1930, it could not collect anything for the services thereafter. At page 94 of petitioner's brief (R. 478), it was asserted that no such issue was raised by the answers nor at the trial of the case. At pages 100-101 of petitioner's brief (R. 482-483), petitioner claimed that Sections 196.19, 196.20 and 196.22 Wisconsin Statutes, were unconstitutional if construed to be applicable because the property of petitioner was taken without due process of law and for inadequate compensation, all contrary to the 14th Amendment of the Federal Constitution.

The rules of practice in the Wisconsin Supreme Court upon appeal, which rules we believe this Court will recognize, do not require the errors relied upon to be set out in the notice of appeal nor in the motion for rehearing,—Rule 37—but it is sufficient that they be stated in the briefs,—Rule 10, Wisconsin Supreme Court Rules; Section 251.264, Wisconsin Statutes, 1939. Under Rule 41, Section 251.41, Wisconsin Statutes, 1939, a motion for rehearing is deemed submitted upon the filing of the arguments in support of and in opposition to the motion. Thus, the motion includes not only the motion itself but all matters presented in the briefs upon the motion. The right claimed under the Federal constitution and relied upon was noticed, asserted and set up in petitioner's argument upon its motion for rehearing. The Court in denying the motion stated that it was sufficiently advised of and concerning the motion (R. 461).

At pages 51-53 of its argument, upon its motion for rehearing (R. 483-484), petitioner claimed that the judgment or mandate of the Wisconsin Supreme Court confiscated petitioner's property without having had a hearing or trial as to said issue first presented by respondent upon the appeal and by requiring the use of petitioner's property for inadequate compensation, all contrary to the 14th Amendment of the United States Constitution. Respondent, at page 13 of

its brief in opposition to petitioner's motion for rehearing (R. 484-485), denied petitioner's claim of right under said constitutional provisions. At pages 8-9 of petitioner's reply to the argument in respondent's brief (R. 485-486), petitioner again reasserted its claim that the decision of the Court took petitioner's property without due process of law, because there was no hearing upon the issues first presented upon the appeal and upon which the court based its decision.

The act complained of is the act of the Wisconsin Supreme Court in reversing the judgment upon an issue not presented nor tried below, another issue having been stipulated at the trial. This act occurred unexpectedly at the end of the proceeding when petitioner no longer had any right to add to the record. The Federal rights involved and claimed appear upon the face of the record. There was no proof as to the issue upon which the Wisconsin Supreme Court determined the case.

After the Wisconsin Supreme Court denied the motion for rehearing, the petitioner also brought the claim of constitutional right to the attention of that court in its assignment of errors upon which it based its application for a stay pending its petition for a writ of certiorari from the United States Supreme Court (R. 462-464).

The Federal rights claimed by petitioner are that Sections 196.19, 196.20 and 196.22, Wisconsin Statutes, as construed by the Wisconsin Supreme Court in this case, are unconstitutional as applied to petitioner in denying it due process of law under the 14th Amendment of the United States Constitution; and that the judgment of the Wisconsin Supreme Court based upon an issue of fact not presented below deprives petitioner of its property without a hearing and without due process of law and contrary to said 14th Amendment.

The first of these claims is based upon the contention that petitioner was required to render service upon demand and was entitled to reasonable compensation for the services so rendered. Its property is as effectually confiscated by requiring a use thereof for inadequate compensation as by a taking of the property for less than its true worth. By applying the provisions of Sections 196.19, 196.20 and 196.22, Wisconsin Statutes, during a period when petitioner was enjoined from changing the rate, the judgment deprives petitioner of its property without due process of law. The second claim of the denial of a Federal right is based upon the undisputed record (R. 468-469), wherein it was at the trial stipulated, in effect, that the issue in the case was the reasonable value of the service and the judgment of the Wisconsin Supreme Court reversing the judgment upon an issue of fact, to-wit, the absence of a specific filed schedule as to West Allis for services after January 1, 1930, which was not presented below, and as to which and the reason for such absence, the petitioner had no hearing as required by the 14th Amendment of the Federal Constitution.

The following cases, among others, it is believed, sustain the jurisdiction of this Honorable Court:

United States v. *Rio Grande Dam & Irrigation Co.*, 184 U. S. 416;

Hulbert v. *Chicago*, 202 U. S. 275;

Lutcher & Moore Lumber Co. v. *William H. Knight et al*, 217 U. S. 257;

Home Telephone & Telegraph Co. v. *Los Angeles*, 227 U. S. 278;

Saunders v. *Shaw*, 244 U. S. 317;

Missouri ex rel. Missouri Ins. Co. v. *Gehner*, 281 U. S. 313, 320;

Moffat Tunnel Improvement Dist. v. *Boynton*, 287 U. S. 620;

Snyder v. *Massachusetts*, 291 U. S. 97, 128;
Woodring v. *Clarksburg-Columbus Short Route Bridge Co.*, 301 U. S. 679.

III.

Statement of Case.

A full statement of the case has been set out under Heading "A" in the petition and consequently is not repeated here in the interest of brevity.

IV.

Opinion Below.

The decision of the Supreme Court of Wisconsin is based upon the theory that because no specific schedule was filed as to West Allis after the termination of the contract on January 1, 1930, there could be no recovery for the services rendered.

City of Milwaukee v. *City of West Allis*, 294 N. W. 625.

The court bases this conclusion upon a prior decision,

Kilbourn City v. *Southern Wisconsin Power Co.*, 149 Wis. 168, 135 N. W. 499,

in which case it announced the doctrine that it was up to a public utility to file a rate with the Railroad Commission or there could be no recovery for the services rendered. However, in that case no injunction nor stipulation as to issues were involved, and there has been a substantial change in the statute concerned.

V.

Specifications of Errors.

The Wisconsin Supreme Court erred:

1. In holding that the rates which were filed were not applicable to West Allis.

8. In failing to hold that because of the injunction and the stipulation as to issues, West Allis could not assert the claim that no specific schedule was on file as to it after January 1, 1930.

3. In deciding the case upon an issue or theory not presented below and upon which petitioner had no opportunity to be heard because of the stipulation and because not presented below.

4. In holding that the petitioner was not entitled to recover upon the basis of the reasonable value of the services rendered as found by the trial court.

ARGUMENT.

Summary of Argument.

A. The judgment of the Supreme Court of Wisconsin rendered without a trial upon the issue of fact in the trial court deprives petitioner of its property without due process of law.

B. Issue upon which Wisconsin Supreme Court decided the case was not raised at trial. That issue related to the filing of a schedule of rates as to West Allis for services rendered after January 1, 1930. This was not presented below and the case was not tried on that theory. Petitioner was precluded from showing that no specific schedule was filed because of injunction obtained by respondent.

C. It was conceded and, in effect, stipulated at the trial that the issue was the reasonable value of the services rendered in furnishing water to West Allis from January 1, 1930, and that petitioner was entitled to recover the excess, if any, over the amount paid at the six cent rate. The effect of the stipulation and of the action of the Wisconsin Supreme Court deprived the petitioner of the right and proper opportunity to present evidence upon the issue.

D. Consumer of public utility should pay reasonable value for services rendered where after termination of formal contract utility cannot change rate. Petitioner could not strictly comply with statute as to filing schedule because injunction prohibited it from collecting more or changing status.

E. After termination of a contract rate a consumer who demands and accepts service having enjoined an increase in rates is liable for the reasonable value thereof. Petitioner went as far as it could, in view of the injunction, in filing rates for water furnished for any purpose outside its city limits. To have filed a specific rate as to West Allis after January 1, 1930, would have changed the status because at that time all that was required to increase a rate was to file the same.

F. A municipally owned water utility is entitled to reasonable compensation for services rendered. Trial court's findings as to reasonable value are supported by sufficient evidence. Judgment of Wisconsin Supreme Court, and statutes as construed by it, take petitioner's property without due process of law;—without a fair hearing and without just compensation.

A.

Judgment of Supreme Court of Wisconsin rendered without a trial upon the issue of fact in trial court deprives petitioner of its property without due process of law.

This Court has jurisdiction to review the Federal question presented in this connection and set aside the decision of the Supreme Court of Wisconsin, because that Court entertained original jurisdiction of a question of fact, of which there was no trial below, and as to which there was no evidence in the record. A litigant is deprived of his day in court and of due process of law when an appellate court decides a case upon a point which was not tried because of justifiable reliance upon conduct or a stipulation by opposing counsel.

United States v. *Rio Grande Dam & Irrigation Co.*, 184 U. S. 416;

Lutcher & Moore Lumber Co. v. *William H. Knight*, 217 U. S. 257;

Saunders v. *Shaw*, 244 U. S. 317;

Willing v. *Binenstock*, 302 U. S. 272;

Helis v. *Ward*, 308 U. S. 365.

Among the grounds upon which the writ is asked is that a new trial should be granted in order to afford petitioner an opportunity to present its evidence upon the issue upon which the Wisconsin Supreme Court decided the case, being upon a theory which had never been tried by the litigants.

Statements of fact erroneously made and having no foundation in the record should not be accepted as concluding petitioner's constitutional right to a trial before a court of competent jurisdiction, according to the regular and established course of judicial proceedings.

Creswill v. *Grand Lodge, K. P. of Georgia*, 225 U. S. 246;

North Carolina R. Co. v. *Zachary*, 232 U. S. 248;

Carlson v. *Washington,* 234 U. S. 103;
Interstate Amusement Co. v. *Albert,* 239 U. S. 560;
Saunders v. *Shaw,* 244 U. S. 317.

B.

Issue upon which Wisconsin Supreme Court decided case was not raised at trial.

In previous actions between the parties, reported in 217 Wis. 614, 621, the Wisconsin Supreme Court had held that petitioner was entitled to recover the excess, if any, of the reasonable value of the services rendered by petitioner to respondent after the termination of the contract on January 1, 1930, over and above the amounts paid by respondent at the six cent rate. The instant action was to recover such excess. The case was tried upon the basis of reasonable value. The issue that there could be no recovery because no specific schedule as to respondent had been filed by petitioner with the Railroad Commission or Public Service Commission was not presented in the pleadings nor at the trial and the case was not tried upon that theory.

Previous to its decision in the instant case, the Wisconsin Supreme Court refused to consider and dispose of questions on appeal which were not properly nor in a timely manner presented for determination of the trial court, and where the questions of law, not raised below, involved factual elements not presented below nor brought to the attention of the trial court.

Herro v. *Heating & Plumbing F. Corp.,* 206 Wis. 256;
Marshall & Ilsley Bank v. *Voigt,* 214 Wis. 27.

Only recently in the case of *Lisbon Town Fire Ins. Co.* v. *Tracy,* 296 N. W. 126, decided February 4, 1941, did the Wisconsin Supreme Court again hold that questions not raised and properly presented for review in trial court will not be reviewed on appeal, the court saying at p. 130:

"On these appeals defendants assert, for the first time, that plaintiff failed to comply with provisions in section 202.11(2), Stats., and in Article 6 of its policies in relation to the contents of notices required to be given by publication in a newspaper and also by mail to each member. As no issue in respect to the contents of those notices was raised by the pleadings or litigated on the trial, the belated contentions of the defendants in that respect will not be entertained on these appeals."

The Wisconsin Supreme Court held in the case of *Wisconsin Power & Light Co.* v. *Beloit,* 215 Wis. 439, at 444, that it may take judicial notice of public service commission files. The effect of a court taking judicial notice of a fact relieves the party who had the burden of proving the same from the necessity of introducing evidence as to such fact. Judicially noticing facts is but a rule of evidence and the party affected adversely by the facts noticed should be permitted an opportunity to introduce evidence to disprove them. That a court will take judicial notice of certain things does not preclude nor deprive the opposite party of an opportunity to rebut the same. Respectable authority elsewhere has reached the same conclusion.

Timson v. *Manufacturers' Coal & Coke Co.,* 220 Mo. 580, 119 S. W. 565, 569.

The Wisconsin Supreme Court took judicial notice of the files of the Public Service Commission, but from January 1, 1930 to April 4, 1935, those files did not contain a schedule of rates specifically applicable to respondent, other than the rate applicable to water used outside the city limits for any purpose by non-contract users (Ex. 14A; R. 329). Petitioner did not have its day in court upon those facts. While the state supreme court may take judicial notice of what is in the files of the Public Service Commission, it should not take such notice of matters not therein contained, because

in so doing the litigant is deprived of his day in court to show why the matter was not in the files. Thus, in the case at bar petitioner was precluded from showing that no specific schedule was filed because of the injunction obtained by respondent.

Sections 196.19, 196.20 and 196.22 of the Wisconsin Statutes are set out in the appendix to this brief. The issue or theory that petitioner was not entitled to recover upon the basis of reasonable value of services rendered because no specific schedule as to respondent was on file from January 1, 1930 to June 7, 1931, and on file and approved after the effective date of Chapter 183, Section 2, Laws of 1931—June 7, 1931—was in no manner raised in the pleadings nor presented to the trial court. An examination of the record discloses no such issue.

C.

Conceded and stipulated at trial that issue was reasonable value of services.

Respondent's counsel conceded at the trial that petitioner was entitled to recover for reasonable value of services if more than six cents per hundred cubic feet. It was conceded that the decision in 217 Wis. 614 made *res judicata* the question that the petitioner was entitled to recover the reasonable value of the service (R. 469).

What is admitted or conceded to be the law by a party at the trial of an action is binding upon him, and if it is accepted by the other side it becomes the law of the particular case. Respectable authorities elsewhere have reached the same conclusion.

Baltimore, etc. R. Co. v. *Resley,* 14 Md. 424;
Sittig v. *Birkenstack,* 35 Md. 273.
Ward v. *Goetz,* 33 Cal. App. 595, 165 P. 1022.

For convenience we here repeat a portion of the proceedings appearing at record page 469. Petitioner's counsel had just offered into evidence the record in the injunctional case:

"Mr. Gram: May I ask, Mr. Drechsler, what the purpose of the offer is?

"Mr. Drechsler: The question of reasonable value of water is concerned, and there are cases that hold that where the utility is enjoined or cannot stop furnishing water that in those cases it is entitled to recover the reasonable value of the service rendered, and this complaint shows that attempt was made by West Allis to stop the city from shutting off the water, and in the complaint there are also allegations that this was the only source of supply that West Allis had for its water, and for other various reasons to establish its ground for injunction; *and the cases which I have cited show that where those things exist the utility is entitled to recover the reasonable value of the service.*

"Mr. Gram: *That question has all been determined res adjudicata so far as this action is concerned.*

"The Court: We will receive the complaint in that other action, unless you see some special reason for receiving more of that file than the complaint.

"Mr. Drechsler: I think that the complaint would be sufficient. That went up and the record in the Supreme Court is shown in 217 Wis. 614. I think that with the complaint would be ample for our purposes.

"The Court: We will receive the entire file. That will make short work of it. Whatever parts of it have direct bearing can be specially made part of our record if it becomes necessary for some reason.

"(Exception.)

"Mr. Gram: *I didn't consider that the question was open.*

"The Court: No.

"Mr. Gram: — *because of the Supreme Court decision, so I am not going to argue with Mr. Drechsler.*

"Mr. Drechsler.: *All right.*"

It should not be permitted that a defendant go to trial and let the case proceed to judgment upon a certain conceded issue or theory without any attempt to assert a certain defense, and then raise that question for the first time in the appellate court in which the adverse party cannot present evidence in opposition thereto. Applying this doctrine to the facts and circumstances previously stated, the effect of the action of the Wisconsin Supreme Court was to deny petitioner its day in court and petitioner was deprived of the right and the proper opportunity to present evidence upon the issue.

Lutcher & Moore Lumber Co. v. *William H. Knight et al,* 217 U. S. 257;
Saunders v. *Shaw,* 244 U. S. 317;
Snyder v. *Massachusetts,* 291 U. S. 97, 128.

D.

Consumer of public utility should pay reasonable value for services rendered where after termination of formal contract utility cannot change rate.

The effect of the decision in this case, if it is permitted to stand, is to bar a public utility from recovering for any services rendered by it to a consumer after a contract which fixed the rate has been terminated, even though the consumer has by injunction prohibited the utility from shutting off the service or changing the rate and the utility is required to furnish adequate service; the consumer has the option to accept or refuse the service, but the utility must furnish it, and cannot refuse to do so, yet the utility cannot recover adequate compensation for the services so rendered under compulsion. The unconstitutionality of such doctrine is here challenged.

On January 18, 1927, petitioner served upon respondent a notice and certified copy of a resolution to terminate the

contract entered into in 1905 on January 1, 1930 (Ex. E; R. 404).

On August 27, 1928, Milwaukee began an action against West Allis to recover the difference between the six cent rate paid and the schedule rate of ten cents (217 Wis. 614).

On December 28, 1929, the City of West Allis commenced an action against Milwaukee to enjoin Milwaukee from discontinuing water service to West Allis and from collecting any other amount than the six cent rate (217 Wis. 614). The record in that case was made a part of the record in the case at bar and is referred to at R. 468-469.

There was a temporary restraining order and after a trial, judgment was entered on February 28, 1934, by which Milwaukee was restrained from changing the rate from the six cent rate and from shutting off the water supply (217 Wis. 614). In view of that judgment the injunctional order which preceded it, the conduct of West Allis and what Milwaukee did to comply as far as it could with the statutes, the application of the rule of the case of *Kilbourn City* v. *Southern Wisconsin Power Co.*, 149 Wis. 168, 135 N. W. 499, and of Section 196.22, Wisconsin Statutes, deprives petitioner of due process of law.

E.

After termination of a contract rate a consumer who demands and accepts service having enjoined an increase in rates, is liable for the reasonable value thereof.

A consumer is liable to pay for the water which it uses where it continues to accept or insist upon service after the termination of a formal contract. The failure of a water utility to file with a State commission the rate charged is not a bar to an action for the reasonable value of the service rendered where a sufficient effort to comply was made or the utility was by the conduct of the consumer

required to continue to furnish the service and could not change the rate.

In the case of *Quarles* v. *City of Appleton,* 299 Fed. 508, the court said at page 517:

> "Because the utility failed to file or include in its schedules the rates charged to the city, it is contended that no recovery can be had in this action. But what schedule could it file. For nearly six years it and the city had been in hopeless disagreement as to the rate chargeable. Failure to agree upon a basis of compensation was no more chargeable to one party than to the other. Plaintiff did seasonably inform the commission that the charge to the city was in dispute, and asked the commission to fix the rate which the city should pay. This, we think, was a sufficient compliance with the statute. No penalty for failure to file rates can or should be enforced, when the utility was unable to comply with this statutory requirement. Certainly neither party should be permitted to dictate what the terms of the contract should be, and when the parties, as in this case, were unable to agree upon a rate, failure of the utility to include in its schedules the charge thus in dispute should not be construed as such a failure to comply with the statute as forfeited its right to recovery."

In the case at bar the two communities had from 1926 at least been in disagreement as to the rate chargeable; West Allis claiming that the contract rate applied; Milwaukee claiming that the rate filed as to outside consumers applied. The Commission knew of the dispute, being a defendant in a suit concerning the rate schedule—*Milwaukee* v. *Railroad Commission,* 217 Wis. 606. The Commission understood that the city claimed that the schedule rates filed applied after the contract was terminated. If what the utility did by way of filing rates after January 1, 1930 (Ex. 14A; R. 329) was not a sufficient compliance with the Wisconsin Statute, Section 196.20, no penalty for failure to file the same can or should be enforced, when the

utility was unable to comply strictly with the statutory requirement. This resulted from the injunctional order, above referred to, obtained by West Allis from the Circuit Court for Milwaukee County which enjoined and restrained Milwaukee from doing anything which would change the then status between the parties.

The rates filed, which is as much as Milwaukee could do, it should be held, precluded the operation of Section 196.22, Wisconsin Statutes. If a specific rate was required to be filed as to West Allis, Milwaukee was prevented from filing such rate because of the injunction. To have filed such a rate on January 1, 1930, or thereafter, would have changed the status between the parties.

Milwaukee could not, in view of the injunction, file a specific schedule as to West Allis, for that would have changed the status between the parties. Section 196.20 as it existed from January 1, 1930, to the effective date of Chapter 183, Laws of 1931, merely required a filing of the schedule. Thus, a mere filing would have resulted in a violation of the injunction. In that, Milwaukee would have ignored the injunction and it and its officers participating would have been liable to the penalties flowing therefrom. Milwaukee did not ignore the injunction because nothing which it did during the duration thereof affected the status prior thereto. Milwaukee went as far as it could go in view of the injunction, and because of the injunctions, Sections 196.20 and 196.22 should not be applied; first, because of substantial compliance under the circumstances; and, second, because the injunctional proceedings excused strict compliance with the statute.

A party who was instrumental by injunctional action in preventing a compliance with the statutory requirements should not receive benefits thereof. Under such circumstances the failure of the utility to strictly comply with the statute should not be construed as such a failure as for-

feited petitioner's right to recovery; otherwise, petitioner is deprived thereof without due process of law.

Respectable authorities elsewhere reach a similar conclusion.

Quarles v. *City of Appleton,* 299 Fed. 508;
Staten Island Water Supply Co. v. *City of New York,* 128 N. Y. S. 1028;
People ex rel. Arthur et al., Fire Com'rs, v. *Huntington Water Works Co.,* 203 N. Y. S. 808;
People ex rel. City of New York v. *Queens County Water Co.,* 232 N. Y. 377, 133 N. E. 889.

It is submitted that these cases are correct on principle, and that the doctrine therein announced, particularly in *Quarles* v. *City of Appleton,* 299 Fed. 508, should be followed in the present case.

F.

A municipally-owned water utility is entitled to reasonable compensation for services rendered.

Petitioner as the owner and operator of a plant and equipment for furnishing water to or for the public is a public utility within the provisions of Chapter 196, Wisconsin Statutes.

Pabst Corporation v. *Milwaukee,* 190 Wis. 349.

As such it can challenge the constitutionality of the provisions of the public utility law as construed by the courts, the same as a private owner of such a utility could challenge the same.

Because the issue as to Sections 196.19, 196.20 and 196.22 of the Wisconsin Statutes was first presented upon the appeal, petitioner's first opportunity to question the constitutionality of the so-called forfeiture statute, Section 196.22, was in its brief at page 100 (R. 482).

Petitioner at all times had rates on file (Ex. 14A; R. 329); it was compelled to furnish the service and could not change the status as to rates or otherwise. That petitioner has not received reasonable compensation for the services which it rendered was recognized by the findings of the trial court, supported by sufficient evidence, as to the reasonable value of the services (R. 37-38).

As a result of the decision, the property of the petitioner will be confiscated without having had a hearing or trial as to the issues first presented by petitioner upon appeal. A fair hearing is one of the important and fundamental requisites of due process of law. Its property is as effectually confiscated by requiring the use thereof for inadequate compensation as by a taking of the property for less than its true worth. The just compensation assured a utility by the 14th Amendment of the United States Constitution is a reasonable return on the value of the petitioner's property at the time it was used in rendering the service. If a utility is required to operate at a rate which is not compensatory, its property is lost.

Pacific Gas & Electric Co. v. *San Francisco,* 265 U. S. 403;

Board of Public Utility Com'rs v. *N. Y. Tel. Co.,* 271 U. S. 23;

Smith v. *Illinois Bell Tel. Co.,* 282 U. S. 133.

A denial of rights given by the 14th Amendment need not be by legislation.

Home Telephone & Telegraph Co. v. *Los Angeles,* 227 U. S. 278;

Saunders v. *Shaw,* 244 U. S. 317.

It is submitted that the judgment of the Wisconsin Supreme Court, and the statutes as construed by it, take petitioner's property without due process of law, to-wit,

without a fair hearing and without just compensation therefor.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers and that a writ of certiorari should be granted and this court should review the decision of the Supreme Court of Wisconsin and reverse it to the end that petitioner's property will not be taken without due process of law, to-wit, without a fair hearing and without just compensation therefor.

Respectfully submitted,

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City Attorney,
Counsel for Petitioner.